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In The

Supreme Court of the United States

October Term, 1992

RALEIGH ELLIOTT, MARK ROCHELEAU, RICHARD ROWE and SYLVIA WELLS,

Petitioners,

vs.

STATE OF VERMONT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT

PETITIONERS' REPLY BRIEF

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ARGUMENT

I. Respondent's Brief Mischaracterizes the Legal Standard For Extinguishment That Was Employed By The Vermont Supreme Court

Respondent's assertion that the Vermont Supreme Court adhered to this Court's holdings in the area of aboriginal rights seriously mischaracterizes the decision below. The decision represents a radical departure from not only this Court's well established judicial policies regarding the rights of Indians, but also from the particular legal requirements and standards for the extinguishment of aboriginal rights. Indeed, the decision below

creates confusion and threatens to undermine federal judicial policy in an area of law in which the Federal Government has exclusive authority. "[F]ederal law . . . protected Indian occupancy and . . . its termination was exclusively the province of federal law." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974).

Far from adhering to this Court's mandate that evidence of extinguishment must be "clear and unambiguous" and cannot be "lightly implied", the decision below effectively determined that an extinguishment could be both lightly implied and determined on the basis of the most ambiguous of evidence.

Respondent's attempt to analogize the Vermont Supreme Court's "weight of history" doctrine with this Court's reference to the "historical setting" in *United States v. Santa Fe Pacific R.R.*, 314 U.S. 339, 358 (1941), points up the essential and fundamental flaws in the Vermont Court's analysis. Unlike the decision below, this Court did not use the "historical setting" as the legal standard for extinguishment. Rather, that setting served merely as part of the evidence to be considered in connection with the legal standard.

The "historical setting" referred to in *Santa Fe* consisted of a long standing effort by the Federal Government to settle the Walapai Indians on a reservation and the ultimate, formal acceptance by the tribe, "in council assembled", of a reservation. *Id.* at 356. This Court relied upon this evidence because it met the legal standards for extinguishment. By contrast, this Court refused to rely upon evidence which did not meet the legal standard. Thus, the Court refused to permit an extinguishment to

be premised on unauthorized military action of the Indian Department or even on Federal legislation which created a reservation for the Walapai's but which did not express a clear intent to extinguish their aboriginal rights. *Id.* at 353, 355-56.

By contrast, the Vermont Supreme Court's decision fails to point to any expression of intent by a sovereign to extinguish the Abenaki's rights to their ancestral homeland. The decision cites a variety of historical events, but none of these events evince an intent to extinguish the Abenaki's rights, either generally or at the site of the fishing in this case. Moreover, under the Vermont decision, the events themselves become the legal yardstick for extinguishment, rather than simply evidence to be considered against the legal template established by this Court's decisions.

II. Respondent's Brief Inaccurately Portrays The Extent Of European Settlement And Abenaki Occupancy Of Missisquoi At The Time Of Vermont's Admission To The Union

Respondent's efforts to portray white settlement in Missisquoi as significant prior to Vermont's admission to the Union is flatly contradicted by the undisturbed findings of the trial court. Thus, Respondent's claim that the trial court's finding that settlement in Missisquoi did not begin until 1783 is somehow an error or unsupported by the evidence ignores the fact that that finding was made twice by the trial court. ("Even in 1783, following the American Revolution, only a handful of Europeans were

settled in Missisquoi.") Pet. App. B 22, FF 104.[1] Far from being unsupported by the evidence, this finding cites to testimony by Professor Colin Calloway, one of Petitioner's expert historians. That testimony, in response to a question by an assistant Attorney General, explicitly supports the trial court's finding. *See also* Pet. App. B 30, FF 115.

In fact, the trial court made numerous findings which support its conclusion that while the tribe lost "some lands it formerly held", "British maps, oral traditions and public records confirm the continued existence of the Missisquoi community in the 1790's." Pet. App. B 12, FF 47. *See also* Pet. App. B 13-14, FF 48 - 56 and B 36, FF 128. While there was some white encroachment in Missisquoi at the time of Vermont's entry into the United States in 1791, the territory clearly was still predominantly occupied by the Abenaki's.

The point is important because even if one were to fully accept the Vermont Supreme Court's analysis, that approach is dependent upon possession and cultivation of Missisquoi by white settlers pursuant to the Wentworth grants at the time of Vermont's admission to the

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[1] The reference by Respondent at page 3 of its Brief to a 1767 petition by a Wentworth grantee on behalf of one thousand other grantees is highly misleading. The grantee in question was from Bennington, in extreme southern Vermont. The petition is on behalf of grantees of lands "on the West side of (the) Connecticut River". Resp. App A 2. The Connecticut River is Vermont's eastern border. Missisquoi is the northwestern portion of Vermont. Southern Vermont was settled long before Europeans began venturing to Missisquoi. The reference to the petition does not and cannot undermine the trial court's findings.

Union in 1791. In fact, white settlement was sparse; there is no showing that the settlement was pursuant to the Wentworth grants and the trial court's findings show that the fishing in this case took place at what had been the Abenaki central village, which remained occupied until 1798.

CONCLUSION

Petitioners respectfully urge this Court to grant their Petition, and reverse the Vermont Supreme Court's denial of Petitioners' motion to dismiss.

DATED: February 3, 1993.

Respectfully submitted,

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